LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JAN 2 1958
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 177

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm, at Rahway, New Jersey.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER, VINCENT CICENIA

DICKINSON R. DEBEVOISE
744 Broad Street
Newark 2, N. J.
Of Counsel

TABLE OF CONTENTS

SUBJECT INDEX

	Page
BRIEF OF PETITIONER, VINCENT CICENIA	
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Question Presented for Review	3
Statement of the Case	3
Summary of Argument	7
Argument	9
POINT I	
Petitioner Was Deprived of Assistance of Counsel in Violation of the Fourteenth Amendment of the United States Constitution	9
A. The Issue	9
B. Basic Principles Involved	10
C. The Law	20
POINT II	
Refusal of the State to Permit Petitioner's Attorney to Inspect the Confession Constituted a Further Element of Unfairness, Vitiating the State Proceedings	28
POINT III	
Petitioner Did Not Waive His Right to Redress by Pleading Non Vult	33
Conclusion	36

TABLE OF CASES CITED

	Page
Anderson v. *Treat*, 171 U.S. 23, 43 Sup. Ct. 351 (1898)	22
Application of Sullivan, 126 F.Supp. 564 (C.D. Utah 1954) *rev'd*, 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956)	21
Canizio v. *New York*, 327 U.S. 82, 90 L.Ed. 545 (1946)	17, 18, 23
Chandler v. *Fretag*, 348 U.S. 3, 99 L.Ed. 4 (1954)	22
In re Domako, 20 N.J. Super. 314, 90 A.2d 30 (App. Div. 1952)	34
Fikes v. *Alabama*, 352 U.S. 191, 1 L.Ed. 2d 246 (1957)	24, 25
In re Groban, 352 U.S. 330, 1 L.Ed. 2d 370 (1957)	25, 26, 27
Haley v. *Ohio*, 332 U.S. 596, 92 L.Ed. 224 (1948)	10, 11
Hawk v. *Olson*, 326 U.S. 271, 90 L.Ed. 61 (1945)	22
Ibrahim v. *Rex*, The Law Reports, Appeal Cases (1914) (Privy Council)	16
Leland v. *Oregon*, 343 U.S. 790, 96 L.Ed. 1302 (1952)	30
Pennsylvania v. *Claudy*, 350 U.S. 116, 100 L.Ed. 126 (1956)	35
People v. *Crooker*, 47 Cal. 2d 348, 303 P.2d 753 (Supr. Ct. 1956), *cert. granted*, —— U.S. ——, 1 L.Ed. 2d 1426 (1957)	20, 21
Powell v. *Alabama*, 287 U.S. 45, 77 L.Ed. 158 (1932)	22
Rex v. *Kay*, 9 C.C.C. 403 (1904)	17
Rex v. *Knight and Thayre*, 20 Cox's C.C. (1905)	16
State v. *Bunk*, 4 N.J. 461, 73 A.2d 249 (1950)	20
State v. *Cicenia*, 6 N.J. 296, 78 A.2d 568 (Sup. Ct. 1951)	5, 29

Page

State v. *Cicenia*, 9 N.J. Super. 135, 75 A.2d 476 (App. Div. 1950) 5

State v. *Cole*, 136 N.J.L. 606, 56 A.2d 898 (E. & A. 1948) 20

State v. *Dorsey*, 207 La. 928, 22 So. 2d 273 (Sup. Ct. 1945) 30

State v. *Grillo*, 11 N.J. 173, 93 A.2d 328 (1952) 20

State v. *Murphy*, 87 N.J.L. 515, 94 Atl. 640 (E. & A. 1915) 20

State v. *Rogers*, 143 Conn. 167, 120 A.2d 409 (Sup. Ct. of Err. 1956), *cert. denied*, 351 U.S. 952, 100 L.Ed. 1476 (1956) 20, 21

State v. *Sullivan*, 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956) .. 20

State v. *Tune*, 13 N.J. 203, 98 A.2d 881 (Sup. Ct. 1953) 29, 30

State v. *Vaszorich*, 13 N.J. 99, 98 A.2d 299 (1953) .. 18

Stroble v. *California*, 343 U.S. 181, 96 L.Ed. 872 (1952) 23

Thomas v. *Mills*, 117 Ohio St. 114, 157 N.E. 488 (Sup. Ct. 1927) 28

Townsend v. *Burke*, 334 U.S. 736, 92 L.Ed. 1690 (1948) 34

Trowbridge v. *Pennsylvania*, 112 F.Supp. 356 (W.D. Penna. 1952), *affirmed*, 204 F.2d 689 (3d Cir. 1953) 34

In re John Henry Tune, 230 F.2d 883 (3d Cir. 1955), *cert. denied*, 351 U.S. 987, 100 L.Ed. 1500 (1956) 30

United States v. *Murphy*, 222 F.2d 698 (2d Cir. 1955), *cert. denied*, 350 U.S. 896, 100 L.Ed. 788 (1955) 12, 16, 23

Uveges v. *Pennsylvania*, 335 U.S. 437, 93 L.Ed. 127 (1948) 22

Page

Watts v. *Indiana*, 338 U.S. 49, 93 L.Ed. 1801 (1949) 11, 12, 16
White v. *Ragen*, 324 U.S. 760, 89 L.Ed. 1348 (1945) .. 22
Williams v. *Kaiser*, 323 U.S. 471, 89 L.Ed. 398 (1945) 17, 21

CONSTITUTION OF THE UNITED STATES:

XIV Amendment, Section 1 2-3

FEDERAL STATUTES:

28 U.S.C. §1254 (1) 2
28 U.S.C. §2101 (c) 2

OTHER AUTHORITIES:

Borchard, *Convicting the Innocent*, Yale Univ. Press (1932) 14, 15
Downing, *Right to Counsel Prior to Trial*, 44 Ky. L.J. 103 (1955) 19
Frank and Frank, *Not Guilty* (Doubleday & Company, Inc. 1957) 13, 14, 15, 19, 32
Knowlton, *Criminal Law and Procedure*, 11 Rut. L.Rev. 71 (1956) 32
MacDonald & Hart, *Admissibility of Confessions*, 25 Canadian Bar Review 823 (1947) 17
Meerloo, *The Rape of the Mind: The Psychology of Thought Control, Menticide and Brainwashing* (The World Publishing Company, 1956) 13
Defendant's Right to Inspect Statements and Confession Before Trial, 38 Minn. L.Rev. 397 (1954) .. 30
Discovery of Defendant's Confession, 29 N.Y.U. L.Rev. 1140 (1954) 30
Pre-Trial Discovery of Criminal Defendant's Confession, 53 Col. L.Rev. 1161 (1953) 30

Page

Pre-Trial Inspection of Confession, 8 Rut. L.Rev. 407 (1954) 31

Request of Defendant for Pretrial Inspection of Confession Held Denied When He Failed to Show Justice Required Such Discovery, 39 Va. L.Rev. 976 (1953) 31

The Third Degree, 43 Harv. L.Rev. 617 (1930) 12, 13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 177

VINCENT CICENIA,

Petitioner,

vs.

R. WILLIAM LAGAY, Superintendent of New Jersey State Prison Farm, at Rahway, New Jersey.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER, VINCENT CICENIA

Opinions Below

The opinion of the United States District Court for the District of New Jersey is set forth at 148 F.Supp. 98 (1956).

The opinion of the Court of Appeals for the Third Circuit is set forth at 240 F.2d 844 (1957).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 7, 1957 (R. 123).

Within the time prescribed by 28 U.S.C. §2101 (c) petitioner served and filed his petition for a writ of certiorari to the Court of Appeals as authorized by 28 U.S.C. §1254 (1).

In this case petitioner was held incommunicado for many hours while police officials questioned him and ultimately obtained a confession from him. During that time petitioner's attorney was at the police station and repeatedly asked to see petitioner. The police officials prevented him from consulting with his client until the confession was signed. Thereafter neither petitioner nor his attorney were allowed to examine the confession. A question of due process arises.

The facts of this case raise the important question of federal law of whether police officials may thus deny to the accused the opportunity to consult with his attorney and of whether the prosecution may deny a defendant the opportunity to examine a statement so obtained.

It is submitted that the rationale of recent United States Supreme Court cases condemns such practices as a violation of the due process clause of the Fourteenth Amendment. It is further submitted that the precise facts of this case have not previously been before this Court and present a question which has not been, but should be, settled by this Court.

Constitutional Provision Involved

The constitutional provision involved in this case is the Fourteenth Amendment of the Constitution of the United States, the pertinent portion of which is as follows:

> Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Constitution, Amendment 14.

Question Presented for Review

Was a defendant, who was arrested by police, held incommunicado for prolonged questioning before arraignment and who was denied the opportunity to confer with his attorney until he had signed a confession to the crime of murder, deprived of his rights under the Fourteenth Amendment of the United States Constitution when the existence of the confession, in conjunction with the refusal of the prosecuting authority to permit either inspection or suppression of the confession, induced defendant to plead *non vult* to the crime with which he was charged?

Statement of the Case

This Court has granted the petition of Vincent Cicenia for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment entered on January 7, 1957, affirming a judgment of the United States District Court for the District of New Jersey denying petitioner's application for a writ of habeas corpus.

The facts upon which petitioner relies are, in the main, undisputed. Stripped to their essentials, they are as follows:

Petitioner, one of eight children, and the child of an immigrant father, had a grade school education and attended vocational school for two years (R. 66, 67). Upon leaving school he worked as a painter and construction

worker (R. 68). He was twenty-one years of age when arrested and questioned in the manner described below (R. 66, 68).

On December 17, 1949 police officers of Orange, New Jersey, called at petitioner's home and not finding him there, left instructions with his family that he was to report to police headquarters (R. 68, 87-88). The following day, upon the advice of his attorney, Frank A. Palmieri, petitioner went to headquarters at 9:00 a.m. with his father and brother. He was immediately placed in custody and held apart from his family (R. 69, 88-89, 90).

Neither petitioner nor his family knew at the time that he was being held for questioning in connection with the murder of Charles Kittuah, which had occurred on March 17, 1947, over two years prior to petitioner's arrest (R. 69, 87).

Petitioner was taken to Newark Police Headquarters, arriving at about 10:00 a.m. (R. 80). Thereafter he was subjected to interrogation by representatives of the Newark Police Department and of the Essex County Prosecutor's Office (R. 70-73, 95-96, 102-104, 110, 116).

At about 2:00 p.m. petitioner's attorney arrived at the Newark Police Headquarters and requested to see petitioner. The request was refused (P. Ex. 1, R. 23, 7). Repeatedly thereafter throughout the course of the afternoon Mr. Palmieri asked to see his client, without avail (P. Ex. 1, R. 24-26; R. 91, 111, 114, 122). As explained at the hearing before the United States District Court by Newark Detective Carlton B. Norris:

> "By that time I had heard that he had an attorney and that an attorney was there, but I wasn't interested. I mean, we have that every day. I mean, attorneys bother us. The minute somebody is arrested they are

there and want to get in. I mean, it comes in one ear and out the other. We pay no attention to them" (R. 122).

Not until 9:30 p.m., after petitioner had signed a seven page confession which had required at least an hour to prepare, was Mr. Palmieri permitted to confer with him (P. Ex. 1, R. 24; P. Ex. 1, R. 32; R. 73, R. 105).

At 11:00 a.m. on December 19, 1949, petitioner was finally arraigned before Judge Jacobs, at which time a complaint was made and read to petitioner charging him with murder. He pleaded not guilty (R. 74). Thereafter petitioner and two co-defendants were indicted for the murder of Charles Kittuah (P. Ex. 1, R. 21, 7).

Mr. Palmieri proceeded to prepare petitioner's defense. Having been denied the opportunity to consult with petitioner during the hours when petitioner was held without warrant or complaint and during which a statement was obtained from him, Mr. Palmieri sought leave to inspect the confession so obtained. He moved for an order directing the Prosecutor to produce petitioner's and his co-defendants' confessions for inspection prior to the trial of the cause and for suppression of petitioner's confession (P. Ex. 1, R. 22, 7).

The motion was denied by the Essex County Court (P. Ex. 1, R. 36, 7). On appeal the Appellate Division affirmed *State* v. *Cicenia*, 9 N.J. Super. 135, 75 A.2d 476 (App. Div. 1950), and though the New Jersey Supreme Court modified the judgment of the Appellate Division, it sustained the denial of petitioner's motion to inspect his confession and for suppression, *State* v. *Cicenia*, 6 N.J. 296, 78 A.2d 568 (1951).

Mr. Palmieri thus found himself in the position of having been denied the opportunity of seeing petitioner during the

crucial period when the state was trying to obtain a confession from him, and of then being denied the opportunity of seeing the confession so obtained. He was faced with the problem that even if he succeeded in preventing admission of the confession in evidence at trial, the jury would be well aware of its existence by virtue of the fact that the jury would hear all the evidence relating to the voluntariness of the confession.

Under such circumstances it is not surprising that Mr. Palmieri recommended to petitioner that he plead *non vult* to the indictment and that petitioner followed the recommendation. On March 29, 1951, such a plea was entered (P. Ex. 2, R. 53, *et seq.*, 7). The importance of the confession obtained under the dubious circumstances prevailing in this case is made strikingly apparent by the remarks made to the Court by Assistant Prosecutor Guiliano when the plea was taken:

> "There are no eyewitnesses to the murder, your Honor, and the State must rely solely, if this case went to trial, on the statements which the defendants gave to the police after their apprehension. The State feels that it would be difficult to convince a jury to return a verdict of guilty of murder in the first degree, which would mean the death penalty, from the facts that it has or the evidence that it has in its possession. As I said before, there are no eyewitnesses to this killing, and the only evidence that the State has against these three defendants; that is, direct evidence, would be their own statements. In view of that fact and of those circumstances that I have just related, I feel that the State should recommend the acceptance of a plea of non vult by each of these defendants to the indictment" (P. Ex. 2, R. 56, 7).

On April 18, 1951, petitioner was sentenced to imprisonment at hard labor for life in State's Prison (P. Ex. 2, R. 65, 7).

In December of 1953 petitioner filed in the Essex County Court an application for a writ of habeas corpus on the grounds that he had been unlawfully arrested, that there had been an unreasonable delay in his arraignment and that he had been denied the right of counsel. On January 21, 1955, the late Judge Conlon determined that petitioner was not entitled to release by way of habeas corpus and an order was entered discharging the writ (R. 8). The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the County Court on July 11, 1955 (R. 8). Petitioner then moved in the Supreme Court of New Jersey for leave to appeal as an indigent, which motion was denied on September 12, 1955 (R. 8). Petitioner applied to the Supreme Court of the United States for a writ of certiorari to review the order of the New Jersey Supreme Court. His petition was denied on December 13, 1955 (R. 8).

Thereafter petitioner filed his application for a writ of habeas corpus in the United States District Court, which, after hearing, was denied by an order dated July 17, 1956 (R. 19). On appeal to the Court of Appeals for the Third Circuit, the decision was affirmed by an order dated January 7, 1957 (R. 123). Thereafter this Court granted a petition in this cause for a writ of certiorari (R. 125).

Summary of Argument

When the Newark, New Jersey, police officials held petitioner for a period of about twelve hours, during which time they subjected him to interrogation and refused to admit his attorney until petitioner had signed a confession, they violated petitioner's right to counsel, secured

to him by the Due Process Clause of the United States Constitution.

Refusal to permit a suspect to confer with his attorney during preliminary police investigation until he signs a statement encourages use of the "Third Degree" and other unfair practices, which are vicious in themselves and which result, upon occasion, in the conviction of innocent persons. Uncontrolled police interrogation of suspects is not essential to effective law enforcement.

Under existing law, as set forth in the decisions of the United States Supreme Court, petitioner in this case is entitled to relief.

The refusal of the New Jersey courts to permit petitioner to examine prior to his trial the confession obtained from him under the circumstances of this case constituted an additional violation of his Constitutional rights.

Petitioner did not waive his right to seek relief in the federal courts by pleading *non vult* to the crime charged. The maximum possible sentence on such a plea was life imprisonment, and the maximum sentence after a trial was death. The existence of the confession, obtained from him when he was denied the right to consult with counsel, induced him to plead *non vult* rather than run the risk of receiving the death penalty.

ARGUMENT

Point I

Petitioner Was Deprived of Assistance of Counsel in Violation of the Fourteenth Amendment of the United States Constitution.

A. *The Issue:* A fundamental issue is presented by the facts of this case. The Newark police held petitioner for a period of ten to twelve hours prior to his confession. During the last seven and one-half of those hours petitioner's attorney actively sought to confer with petitioner. The Newark police and an official of the Essex County Prosecutor's Office declined to permit so much as a conference between attorney and client until they obtained what they wanted. Their attitude towards the requests of attorneys was frankly described by respondent's own witness, Detective Norris, who stated as to such requests, "I mean, it comes in one ear and out the other. We pay no attention to them."

The Court in this case must decide whether advice and assistance of counsel is a fundamental right to which an accused is entitled or whether it is a mere shibboleth, recognized only when it is convenient for police officials to do so.

It is respectfully submitted that the Courts below erred in holding that lack of counsel at the time of police interrogation in the circumstances of this case did not invalidate the confession. In spite of its holding, however, the District Court clearly recognized that the practices of the Newark police and of the Essex County Prosecutor's Office were a mockery of the right of assistance of counsel.

> ". . . Despite these considerations one cannot help stating that a personal reaction to the manner in which

> the police chose to extract petitioner's confession from him is a highly adverse one. Not only was petitioner deprived of a cherished American right—the right to see a lawyer—but the dignity of the legal profession itself was demeaned when the police and an assistant prosecutor arbitrarily refused to permit this petitioner's counsel to perform the traditional role of the lawyer in informing an accused of his rights . . ." (R. 16).

The repugnance of the District Court was echoed by the Court of Appeals in this case when it felt obliged to affirm the judgment denying relief. The Court stated, "We repeat, however, what the trial court said, that 'This result is reached without enthusiasm'" (R. 19).

B. *Basic Principles Involved:* If one considers the implications of holding that a suspect may not see his attorney until police officials have obtained from him such statements as they need, it becomes readily apparent why the courts below were so reluctant to rule as they did.

We have long been proud that our system of prosecution for crime is accusatorial rather than inquisitorial, depending upon careful investigation rather than upon gruelling interrogation of suspects.

> "Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed." *Haley* v. *Ohio*, 332 U.S. 596 at p. 606, 92 L.Ed. 224 at p. 232 (1948) (Justice Frankfurter's opinion).

> "Under our system society carries the burden of proving its charge against the accused not out of his

> own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts* v. *Indiana*, 338 U.S. 49 at p. 54, 93 L.Ed. 1801 at p. 1806 (1949).

This Court has recognized the evils of uncontrolled interrogation of an accused by police, which smacks of the inquisitorial system of prosecution.

> "Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards." *Watts* v. *Indiana, supra*, U.S. at p. 55, L.Ed. at p. 1806.

Recognition of an accused's right to the assistance of counsel is one important way by which abuse of police interrogation can be curbed, and its absence leads only to the most vicious evils of uncontrolled questioning.

> "No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion." *Haley* v. *Ohio, supra*, U.S. at p. 600, L.Ed. at p. 229.

There are many evils inherent in the practice of permitting police to interrogate suspects for unlimited periods of time without granting the suspect the right of counsel and permitting statements obtained from the suspect to be used against him.

In the first place, it presents a tempting opportunity for the police to use violence to coerce the accused into giving a confession or other statement, and the accused is usually

in such a position that he cannot later establish that the statement was coerced.

The usual situation is that the accused is questioned in the presence of a number of police officials. At the trial for the offense with which the suspect is charged, the question of the voluntariness of the confession is a factual question to be decided on the basis of the evidence before the court. The evidence will consist of the testimony of the accused as to any coercive measures used, and pitted against that will be the testimony of a number of police or prosecutor personnel that no coercion was used. If the evidence is conflicting the trier of facts (whether the judge or the jury) is entitled to draw either conclusion. Inevitably the trier of facts will, on occasion, be wrong.

The accused is in an even worse position in a habeas corpus proceeding when he attempts to show that a confession used against him was coerced. The law is clear, that if the confession was coerced, a conviction based thereon is invalid, e.g., *Watts* v. *Indiana, supra.* But a federal court will not find as a fact that he was coerced if the evidence is in conflict, as it usually is when such an issue is raised, e.g., *United States* v. *Murphy,* 222 F.2d 698 (2d Cir. 1955), *cert. denied,* 350 U.S. 896, 100 L.Ed. 788 (1955).

It is impossible to state how frequently police use improper methods of questioning suspects. It can be established that resort to such methods of questioning is not infrequent, *The Third Degree,* 43 Harv. L. Rev. 617 (1930).

> "How common are these practices? No one really knows. Because an accused officer will almost always deny that he indulged in them, and because they are conducted in secret, statistics are difficult, almost impossible to get. Yet it is common knowledge that the third degree, in recent years, has been applied in al-

most every state of the Union. Numerous trial records mention instances where it has been exposed, and an American Bar Association committee said in a report made in 1930, 'For every one of the cases which . . . find a place in the official reports, there are many hundreds and probably thousands, of instances of the use of the Third Degree in some form or other.'" Frank and Frank, *Not Guilty* (Doubleday & Company, Inc. 1957) at p. 181.

A contrast of English and American experience with coerced confessions suggests the extent which uncontrolled preliminary examination leads to such confessions. A study made in 1930 reviewed the multiplicity of extorted confessions in the United States in contrast to the virtually complete absence of such confessions in England, where preliminary examination is severely limited, *The Third Degree*, 43 Harv. L. Rev. 617 (1930).

One means of avoiding coercion or other equally unfair practices, is to enforce the right of an accused to consult with his counsel at every stage of the proceedings against him, including his interrogation by police.

Physical coercion is not the only evil which the absence of counsel encourages. Mental coercion may be used with equally unfair results. The experience of United States troops in the Korean War demonstrated that most men have a breaking point when subjected to prolonged pressure designed to elicit an admission of some fact. Meerloo, *The Rape of the Mind: The Psychology of Thought Control, Menticide and Brainwashing* (The World Publishing Company, 1956).

"But policemen have discovered that they need neither intricate devices nor violence. The easiest way to persuade a man to confess to whatever you want is

to deprive him of sleep beyond the point of normal exhaustion, questioning him endlessly. As a Louisiana judge put it, 'I myself might make a false confession of having murdered my own father if I were kept awake and prodded with questions.' " Frank and Frank, *supra,* at p. 181.

If confessions obtained either through violence or through other unfair treatment of an accused held without benefit of counsel came only from guilty persons there might be something (although not much) to be said in favor of such treatment. The fact of the matter is, however, that upon occasion the innocent as well as the guilty succumb to such tactics, pleading guilty to crimes they did not commit.

One author has reviewed a number of cases in which the innocent have been convicted, often on the basis of false confessions, Borchard, *Convicting the Innocent* (Yale Univ. Press 1932).

". . . While confessions may often seem conclusive, they must be carefully examined. Persons charged with crime are not infrequently of defective or inferior intelligence, and, even without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result. State's Attorney Homer Cummings, in the Connecticut case of Israel, who under pressure confessed the murder of a priest, but whom Mr. Cummings refused to try, said:

'It was the opinion of the physicians that any confession made by the accused was totally without value, and they were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation and suggestion, in due course he would be reduced to such a

> mental state that he would admit practically anything his interrogators desired. They further stated that this was a common phenomenon with certain types of people, and that where such people are subjected to interrogations, accusations or suggestions from persons of stronger will, the lesser mind will ultimately succumb and accept the conclusions of the more powerful intellect.'" Borchard, *opus cited supra* at pp. xvii, xviii.

More recently, the late Judge Jerome Frank and his daughter described other instances where the innocent paid for the crimes of the guilty, often as a result of confessions obtained during uncontrolled police interrogation.

> "Within the past year, a distinguished public prosecutor remarked that a conviction of an innocent man is a 'rare exception'. The cases described in this book, together with earlier cases reported by Borchard in 1932 in his great book, *Convicting the Innocent*, will alone serve to show that the number of known cases of that kind is not inconsiderable. But what of the undiscovered cases? No one can possibly learn how many an innocent is now in prison, or died in the government's electric chair or gas chambers, for want of a disclosure that he did not commit the crime." Frank and Frank, *supra*, at pp. 35, 36.

It is too much to hope that errors will never be made in the enforcement of the criminal law. But it is not too much to expect that all practical measures to reduce the frequency of such errors will be taken. Permitting an accused to consult with his counsel during police interrogation is one method of eliminating false confessions, which are a substantial cause of many wrongful convictions.

The so-called "practical" argument advanced to support the contention that police should be permitted to question suspects prior to arraignment and without counsel is that such interrogation is a necessary tool in successful law enforcement, see the concurring opinion of Justice Jackson in *Watts* v. *Indiana, supra.*

Experience, however, suggests that this argument applies primarily where law enforcement authorities lack the trained personnel and equipment necessary to properly investigate criminal acts. When such personnel and equipment are lacking, greater reliance must, perhaps, be placed upon relentless interrogation of suspects.

But where adequate resources are devoted to law enforcement, reliance need not be placed upon such primitive techniques as those employed in this case by the Newark police. For example, the F.B.I., whose effectiveness is generally admitted, has no need to resort to such methods, see *United States* v. *Murphy, supra.*

Similarly, English law enforcement has functioned effectively for generations even though statements made by a suspect to police officials are viewed with a scrutiny far more severe than in the United States, see discussion in *Ibrahim* v. *Rex*, The Law Reports, Appeal Cases (1914) (Privy Council); *Rex* v. *Knight and Thayre*, 20 Cox's C.C. 711 (1905) (a confession obtained after six hours of police interrogation without threats or inducements excluded).

Application of the English rule requires that confessions obtained during preliminary interrogation of a suspect by police be regarded with the gravest suspicion:

> ". . . In this case the statements were made after arrest of the accused in answer to questions put by the chief constable. In such a case it is not, in my opinion, sufficient for the prosecution to show that no induce-

ments were put forward by way of threat or promise, express or implied. The arrest and charge are in themselves a challenge to the accused to speak; and inducement within the rule." *Rex* v. *Kay*, 9 C.C.C. 403 (1904) (a Canadian case) as quoted in MacDonald & Hart, *Admissibility of Confessions*, 25 Canadian Bar Review 823 (1947).

The purpose of noting the English position on the subject of confessions, of course, is to indicate that effective law enforcement does not depend upon the use of confessions obtained after protracted police interrogation.

The fact that local governments are unwilling to appropriate the resources which would be required for effective solution of crimes without depriving suspects of such time-honored rights as assistance of counsel would seem a totally inadequate ground for a federal court to eliminate or severely curtail such right.

> "Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accommodated to the constitutional guaranties of the individual." *Williams* v. *Kaiser*, 323 U.S. 471 at p. 476, 89 L.Ed. 398 at p. 403 (1945).

The above considerations should suggest why assistance of counsel during police interrogation taking place after arrest and prior to arraignment is a fundamental right, denial of which emasculates the recognized right of an accused to counsel. The importance of counsel throughout all the proceedings was pointed out by Justice Murphy in his dissenting opinion in *Canizio* v. *New York*, 327 U.S. 82, 90 L.Ed. 545 (1946):

> "In my opinion, however, the right to counsel means nothing unless it means counsel at each and every step in a criminal proceeding. The failure at any particular point to have representation or to be aware of one's right to counsel may have an indelible and imponderable effect upon the entire proceeding, an effect which may not be erasable on the day of imposing the sentence." U.S. at p. 89, L.Ed. at p. 550.

The instant case is strikingly illustrative of the wisdom of Justice Murphy's remarks. The effects of the unlawful deprivation of counsel were indeed imponderable. The confession undoubtedly resulted therefrom. That confession hung like a sword poised over petitioner throughout all the subsequent proceedings. Its influence upon the petitioner's decision to plead cannot but have been profound. He was undoubtedly advised by his attorney that had he gone to trial the trial judge might have refused to admit such a confession in evidence. But he must also have been advised of the probable effect upon a jury of hearing the prosecutor refer to such confession and of hearing all the evidence relating to the voluntariness of the confession, as is the practice under New Jersey law, *State* v. *Vaszorich*, 13 N.J. 99, 98 A.2d 299 (1953).

> "Even if the accused can hire an attorney, police officers taking him into custody can deny him an opportunity to retain counsel without incurring serious risk that a confession they exact from him will be invalidated. The stark truth of the matter is that a guarantee of counsel only at the trial stage is in many cases a mere shell, affording the defendant little or no real benefit and not at all satisfying the basic requirements of fairness and justice. The ideal time at which an accused should be allowed to retain counsel or have counsel assigned is immediately after his arrest . . .

It is submitted that the only way to accomplish this result is to strictly enforce the right, which he has already in theory, by rendering inadmissible evidence obtained from the defendant after he has been refused opportunity to obtain and consult counsel." Downing, *Right to Counsel Prior to Trial*, 44 Ky. L.J. 103 (1955) at p. 111.

The effect of the Court's decision in this case will be profound. As a practical matter if the judgment below is affirmed, the Court will be ruling that a suspect has no right of counsel during police interrogation prior to arraignment, and that the police may continue such interrogation until they obtain what they need from a suspect. Mere verbal support of the right of counsel would have little utility.

> "But, altogether too often, the upper court affirms a conviction, contenting itself with a rhetorical flourish about the prosecutor's unseemly conduct, remarking that he failed to act as 'an officer of the court,' a 'servant of the law,' and had gone far 'beyond the canons of decorum . . . which a governmental officer should observe.' Such remarks, without more, may be worse than useless. Practically, they add up to actual approval of the criticized misconduct. For the kind of prosecutor who, eager to procure a conviction, resorts to such improper tactics, will act on the assumption that almost always, in the future as in the past, the courts will merely express displeasure and will not upset the prosecutor's victories. The court's deprecatory words become purely ceremonial. The misbehaving but victorious prosecutor gladly pays what to him is a small price —a ritualistic verbal spanking, a mere slap on the wrist." Frank and Frank, *supra* at pp. 238, 239.

If, on the other hand, this Court reverses the judgment below, it will sustain a cherished right not only for this peti-

tioner, but for countless others, for the innocent as well as for the guilty. It will sustain a right which, it is submitted, is his by virtue of the United States Constitution.

C. *The Law:* In candor it must be stated that the highest courts of New Jersey have ruled that an accused may be denied the opportunity to consult with counsel during the period of police interrogation between arrest and arraignment, and that the right to counsel contemplates only assistance of counsel in the trial, and preparation for trial, of a case.

> *State* v. *Grillo*, 11 N.J. 173, 93 A.2d 328 (1952);
> *State* v. *Bunk*, 4 N.J. 461, 73 A.2d 249 (1950);
> *State* v. *Cole*, 136 N.J.L. 606, 56 A.2d 898 (E. & A. 1948);
> *State* v. *Murphy*, 87 N.J.L. 515, 94 Atl. 460 (E. & A. 1915).

Although the New Jersey position has support in certain other jurisdictions,

> E.g., *State* v. *Sullivan*, 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956);
> *People* v. *Crooker*, 47 Cal. 2d 348, 303 P.2d 753 (Supr. Ct. 1956), *cert. granted*, —— U.S. ——, 1 L.Ed. 2d 1426 (1957);
> *State* v. *Rogers*, 143 Conn. 167, 120 A.2d 409 (Sup. Ct. of Err. 1956), *cert. denied*, 351 U.S. 952, 100 L.Ed. 1476 (1956),

there is widespread protest against such a harsh rule:

> "There is no significant difference between denial of counsel at the trial and such denial before trial to the point that no trial lawyer could be effective, no matter how skilled. The failure to have counsel in regard to all

matters up to and through the arraignment and plea 'permeates the entire proceeding, with indelible effects that could not be removed.' The error was done; the damage was committed." *Application of Sullivan*, 126 F.Supp. 564 at p. 571 (C.D. Utah 1954), *rev'd* 227 F.2d 511 (10th Cir. 1955), *cert. denied*, 350 U.S. 973, 100 L.Ed. 844 (1956).

"The defendant's confession was undoubtedly an important factor in defendant's conviction of the crime of which he was accused. The confession was made without benefit of counsel which had been requested by defendant. It appears to me that if our constitutional safeguards are to be observed, they should be observed to the letter." *People* v. *Crooker, supra*, 303 P.2d at p. 761 (dissenting opinion).

"However, if the two removals of the defendant and the two detentions were the only illegal acts perpetrated on him, one might deplore them without necessarily challenging the voluntariness of the confession that followed. But where we are met with orders barring an accused from conferring with his counsel, we reach what seems to me to be constitutional illegality. . . . Such orders involve the denial of due process guaranteed by the fourteenth amendment to the federal constitution. . . . " *State* v. *Rogers, supra*, 120 A.2d at pp. 415, 416 (dissenting opinion).

The decisions of the courts of New Jersey, however, are not dispositive of the question whether petitioner was deprived of counsel in violation of a right protected by the Fourteenth Amendment of the United States Constitution. Such a question is to be resolved by federal law, *Williams* v. *Kaiser*, 323 U.S. 471, 89 L.Ed. 398 (1945).

Under federal law, it can hardly be disputed that a person accused of a capital offense under the circumstances of

the present case is entitled to counsel at some point in the proceedings, *Uveges* v. *Pennsylvania*, 335 U.S. 437, 93 L.Ed. 127 (1948). The right to counsel is a right to *effective* counsel. For example, counsel must be given adequate time to prepare his case, *Hawk* v. *Olson*, 326 U.S. 271, 90 L.Ed. 61 (1945); assigned counsel must conscientiously fulfill his responsibilities, *White* v. *Ragen*, 324 U.S. 760, 89 L.Ed. 1348 (1945).

> "That Amendment (The Fourteenth) is violated also when a defendant is forced by a state to trial in such a way as to deprive him of effective assistance of counsel." *Hawk* v. *Olson, supra*, U.S. at p. 276, L.Ed. at p. 65.

Effective assistance of counsel requires such assistance be available during any significant proceedings in the cause, *Chandler* v. *Fretag*, 348 U.S. 3, 99 L.Ed. 4 (1954).

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama*, 287 U.S. 45 at p. 57, 77 L.Ed. 158 at p. 164 (1932).

Until recently it might have been argued that this Court had not decided whether refusal by police to permit an accused person to consult with his attorney during protracted interrogation designed to elicit a confession is a violation of due process, *Anderson* v. *Treat*, 172 U.S. 23, 43 Sup. Ct. 351 (1898) (question raised but not decided).

Even before the more recent Supreme Court cases which, it is submitted, sustain the right to consult with counsel during police interrogation, the implication was strong that such a right would be enforced.

In those cases which held that under the circumstances prevailing therein a petitioner was not entitled to a writ of habeas corpus even though he did not have counsel at any early stage in the proceedings, the Court was careful to point out that petitioner had not been prejudiced by absence of counsel, e.g. *Canizio* v. *New York*, 327 U.S. 82, 90 L.Ed. 545 (1946).

> "While district attorneys should *always* honor a request of counsel for an interview with a client, upon the record before us there is no showing of prejudice." *Stroble* v. *California*, 343 U.S. 181 at p. 198, 96 L.Ed. 872 at p. 885 (1952). (Italics supplied.)

In the present case, the prejudice resulting from refusal of the law enforcement officials to permit petitioner's attorney to consult with his client was drastic and irremediable.

The Court of Appeals for the Second Circuit faced an issue similar to the one presented in this matter, *United States* v. *Murphy*, 222 F.2d 698 (2nd Cir. 1955), *cert. denied*, 350 U.S. 896, 100 L.Ed. 788 (1955). The facts of that case closely resemble those prevailing in the instant one.

The petitioner in the *Murphy* case was taken into police custody, and interrogation (presumably unaccompanied by violence) proceeded until a confession was given. The Court condemned the police methods employed in the harshest terms, stating:

> "Alone or together, neither the unlawful detention for many hours nor the deceit in confronting Caminito

with disguised police officers who lied in identifying him would suffice to vitiate the confessions as unconstitutionally obtained. But those factors did aggravate the following unconstitutional practices which—even in the absence of those factors—rendered the confession inadmissible: (a) The police interrogated him almost continuously for 27 hours, with but a brief interval for rest in a cell so badly equipped as to make sleep virtually impossible for a man already harried by the questioning. (b) During this long period, the police, in effect, kidnapped him: They kept him incommunicado refusing to allow his lawyer, his family, and his friends to consult with him.

"Accordingly, the writ of habeas corpus must issue. . . ." at pp. 700, 701.

During the past year, moreover, two Supreme Court decisions gave added support to the right of counsel in circumstances such as those prevailing in the present case. The recent decision of *Fikes* v. *Alabama*, 352 U.S. 191, 1 L.Ed. 2d 246 (1957) indicates what the Court's decision would be were that the sole issue.

In that case the majority placed great stress on the fact that during the protracted period of questioning, the defendant was not allowed to receive his father or an attorney who wished to see him. The opinion of the dissenting Justices would appear to indicate that they would change their position if an accused were prohibited from having his attorney see him.

"I am not satisfied that there was any deliberate purpose to keep the petitioner incommunicado, such as existed in Watts v. Indiana, Turner v. Pennsylvania, and Harris v. South Carolina (U.S.) all supra. Before the first confession, petitioner, at his own request, was

permitted to see the sheriff of his home county, and his employer. His father, although not permitted to see petitioner on the day of his first confession, was allowed to see him before the second confession. *The lawyer who sought to see petitioner was refused permission because, having no authority from petitioner or his family to present him,* the prison authorities evidently thought he was trying to solicit business." Dissenting opinion 352 U.S. at pp. 200, 201, 1 L.Ed. 2d at 253. (Italics supplied.)

Mr. Palmieri had the requisite authority from the petitioner and his family to represent the petitioner. The police were aware of this fact as was the Assistant Prosecuting Attorney. To thus deny the petitioner his right to have his counsel see him when merely separated by a door constitutes a shocking disregard of the civilized standards recognized by the Anglo-American world.

The case of *In re Groban*, 352 U.S. 330, 1 L.Ed. 2d 370 (1957) suggests even more strongly that exclusion of counsel during preliminary examination in a criminal case is a violation of due process.

That case concerned an Ohio Fire Marshal's investigation of the cause of a fire on petitioner's premises. The petitioner's attorney was not permitted to attend the hearings, and when the petitioner refused to be sworn under such circumstances he was imprisoned. Although this Court held that petitioner was not entitled to counsel because the matter was in the nature of an administrative investigation, it noted that the rule would be otherwise in a criminal matter.

"It is clear that a defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel . . . Prosecution

of an individual differs widely from administrative investigation of incidents damaging to the economy or dangerous to the public. The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire." 352 U.S. at p. 332, 1 L.Ed. 2d at p. 380.

The dissenting opinion attacks more strongly the practice of questioning a suspect without permitting the presence of counsel.

"I believe that it violates the protections guaranteed every person by the Due Process Clause of the Fourteenth Amendment for a state to compel a person to appear alone before any law-enforcement officer and give testimony in secret against his will." 352 U.S. at p. 337, 1 L.Ed. 2d at p. 383.

"The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his assistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced." 352 U.S. at pp. 340, 341, 1 L.Ed. 2d at p. 385.

"Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of

the interrogators, as a practical matter, he is subject to their uncontrolled will." 352 U.S. at pp. 341, 342, 1 L.Ed. 2d at p. 386.

"I also firmly believe that the Due Process Clause requires that a person interrogated be allowed to use legal counsel whenever he is compelled to give testimony to law-enforcement officers which may be instrumental in his prosecution and conviction for a criminal offense. This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every state of the proceedings against him. . . . The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination." 352 U.S. at p. 344, 1 L.Ed. 2d at p. 387.

It has been argued in the present cause that petitioner is not entitled to relief because, while it is admitted that his attorney attempted to confer with him, only his own testimony supports the contention that he asked to see his attorney.

This, it is submitted, is dodging the issue in the case. It is undisputed that both petitioner (R. 23) and his family (R. 28) retained Mr. Palmieri to represent him in whatever matter the police were investigating. The only inference that can be drawn when a person retains counsel is that he wants counsel to do whatever is necessary and proper to protect his client's interests.

"In our judgment, however, it is immaterial whether the client seeks his attorney or the attorney seeks the client. If the relationship of client and attorney actually exists, it is the duty of diligent counsel to seek a conference in order to consult as to steps to be taken

> in the proceedings. Surely an attorney is unfaithful to his trust if he does not, when in his judgment the occasion requires it, endeavor to confer with his client for the purpose of planning his case. Surely, also, the right to consult with one's attorney includes the right to have a conference, which is sought not by the client, but by the attorney himself. Hence this objection on behalf of the warden is overruled." *Thomas* v. *Mills*, 117 Ohio St. 114, 157 N.E. 488 at p. 489 (Sup. Ct. 1927).

It is respectfully submitted that not only compelling considerations of justice but also the decisions of this Court support petitioner's claim that he was denied due process of law when his attorney was prevented from consulting with him in the Newark police station.

Point II

Refusal of the State to Permit Petitioner's Attorney to Inspect the Confession Constituted a Further Element of Unfairness, Vitiating the State Proceedings.

In the present case not only did the State officials bar petitioner from his attorney until after police confinement and interrogation resulted in a confession, but they also refused to permit the attorney to see the confession, a document which required an hour or more of Detective Meagher's time to write out in longhand (R. 73, 105).*

Prior to the time for trial petitioner's attorney moved for an order directing the Prosecutor to produce the confession (along with those of petitioner's co-defendants) for

---

* Cicenia's recollection was that about an hour was devoted to writing out the statement (P. Ex. 1, R. 33; R. 73). Detective Meagher estimated that it took him nearly three hours to write down the statement (R. 105).

inspection and for an order suppressing petitioner's confession (R. 22). The Supreme Court of New Jersey upheld the denial of both motions, stating that a defendant does not have an absolute right to inspect his confession before trial, the right being discretionary with the trial court, and stating that the trial court does not have the right to suppress a confession, *State* v. *Cicenia*, 6 N.J. 296, 78 A.2d 568 (Sup. Ct. 1951).

In a later case in which a trial court exercised its discretion to permit a defendant to examine his confession, the New Jersey Supreme Court, in a 4 to 3 decision, held that such discretion was abused and that the accused should not be permitted to make such examination, *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881 (Sup. Ct. 1953).

The dissenting opinion in the *Tune* case, which deplored the unfairness of the decision, bears upon the issues of the present matter:

> "This accused's confession, as indeed is true virtually of all confessions, was the product of *ex parte* discovery in a form which would never be tolerated in a civil cause. The accused was without counsel, denied even the comfort of the presence of a friendly face, in 'conversations' in the small hours of the morning with a sizeable group of police officers, the document not even of his composition but the 'narrative' put down and composed by Lieutenant Neidorf. Under such circumstances the State could and did, at its leisure and without hindrance or interruption, since none was there in the interest of the accused, persist until there was drained from him everything necessary to support the charge against him, and that the State prizes the result for that reason is manifest from the tenacity with which defense counsels' effort to see it is resisted." 13 N.J. at p. 232, 98 A.2d at p. 896.

> "What counsel sought was the opportunity to do what the State did when the trail was fresh, namely, seek corroboration or lack of it from external facts through avenues of inquiry opened by the confession. By pitching part of its argument upon the voluntariness of the confession, the majority ignores the true significance of the purpose of counsels' application, that is, to be in a position at the trial to meet the issue of the confession's credibility or the completeness of the tale it tells." 13 N.J. at p. 234, 98 A.2d at p. 897.

In one state it has been held that refusal to give the defense a copy of a confession is per se a violation of due process, *State* v. *Dorsey*, 207 La. 928, 22 So. 2d 273 (Sup. Ct. 1945). The federal courts have not yet gone quite so far.

> E.g., *Leland* v. *Oregon*, 343 U.S. 790, 96 L.Ed. 1302 (1952);
>
> *In re John Henry Tune*, 230 F.2d 883 (3d Cir. 1955), *cert. denied*, 351 U.S. 987, 100 L.Ed. 1500 (1956).

It is submitted, however, that the time has come to review the rule denying a defendant the opportunity to examine his own statement made during preliminary police interrogation. The prevailing practice has been subjected to scathing criticism.

The law review discussions of the majority opinion in the *Tune* case are unanimous in condemning it.

> *Pre-Trial Discovery of Criminal Defendant's Confession*, 53 Col. L.Rev. 1161 (1953);
>
> *Defendant's Right to Inspect Statements and Confession Before Trial*, 38 Minn. L.Rev. 397 (1954);
>
> *Discovery of Defendant's Confession*, 29 N. Y. U. L.Rev. 1140 (1954);

Pre-Trial Inspection of Confession, 8 Rut. L.Rev. 407 (1954);

Request of Defendant for Pretrial Inspection of Confession Held Denied When He Failed to Show Justice Required Such Discovery, 39 Va. L.Rev. 976 (1953).

A New Jersey law professor added his voice to the chorus denouncing the prevailing New Jersey practice.

"The New Jersey rules require a hearing without unnecessary delay after an arrest. At this hearing the arrested person must be given an opportunity to employ counsel and, in some instances, is released, either because of lack of probable cause or upon bail. It would appear that this rule is more violated than honored.

"The only rational inference to be derived from failure to observe the rule is that the police are consolidating their case. This does not imply that physical violence in all, or even most, cases is being utilized or that coerced confessions, within the meaning of that term as employed by the United States Supreme Court, are being extracted. It does mean, however, that the police are using methods of discovery not recognized or sanctioned by the rules.

"Contrasted to this effective method of police discovery, the defendant is denied all but the most meager forms. Although the right to examine his confession is purportedly within the trial court's discretion, apparently the only time it can be exercised in favor of the defendant is when he claims the confession was coerced. Counsel for the defendant, who may enter the case considerably after the confession was obtained, must rely upon the recollection of the accused to prepare his defense. One cannot but share Judge Waugh's concern as he reluctantly refused inspection of a con-

fession in English which was signed by the accused who spoke, wrote, and understood only Spanish." Knowlton, *Criminal Law and Procedure*, 11 Rut. L. Rev. 71, at pp. 72-74 (1956).

The basic injustice and unreasonableness of denying to a defendant the right to examine his confession before trial is described in the Franks' book, *Not Guilty, supra.*

> "The majority of American lawyers now welcome 'discovery' in non-criminal cases. Strangely, however, most American courts grant little or no 'discovery' to defendants in criminal cases. There the theory of a trial as a fight or game still prevails, and with it the right to use strategic surprise. Yet one would think that, since life or liberty is at stake, we would be more generous in helping the accused in a criminal case to defend himself than the defendant in a non-criminal case who stands to lose only money.
>
> "It should much disturb us that, except in the U.S.A., today in every civilized land the accused, in advance of trial, is informed of the evidence the government will present against him.
>
> "In England and Canada, before an accused is put on trial, there has to be a preliminary court hearing at which the prosecution discloses all its evidence. The suspect hears the testimony of all the government's witnesses and has the right to cross-examine them, and he also sees all the documents the government proposes to use." at pp. 243, 244.

Even if this Court is unwilling to hold that refusal to grant a defendant the opportunity to examine his confession is per se a violation of due process, the additional facts in the instant case require such a holding in this matter.

In the present case the refusal of the State to permit defense counsel to inspect the confession, and, in fact, the refusal of the State Court to suppress the confession, must be viewed in connection with the undisputed circumstances under which the confession was obtained, the refusal to permit petitioner to consult his attorney during the period of interrogation which led up to the signing of the confession, and the importance of the statement in connection with the plea which petitioner entered.

Viewed together with those circumstances, denial to defense counsel of an opportunity to inspect the confession violated petitioner's constitutional rights in two ways: (1) It was highly prejudicial in that it sealed off an opportunity of partially undoing the damage already wrought by the refusal to permit petitioner to consult with his attorney. (2) It, together with that refusal to permit petitioner to consult with his attorney during the period of interrogation, constituted a denial to petitioner of his right to have effective counsel.

Point III

Petitioner Did Not Waive His Right to Redress by Pleading Non Vult.

Petitioner was sentenced to imprisonment after he had pleaded *non vult* to the crime with which he was charged rather than as a result of conviction after trial. That fact, however, does not bar petitioner from instituting this proceeding.

It is readily apparent that petitioner's plea was induced by the very existence of the confession which was obtained from him during the period he was denied the opportunity of seeing his attorney. At the time of sentencing the assistant prosecutor emphasized that the only evidence that

the State had against petitioner was his confession and the confessions of two others similarly accused.

The inducement to plead was succinctly stated by the District Court in its opinion in this cause:

> "To put it another way, when an accused voluntarily pleads guilty or non vult after rendering a confession to the police there is very little ground left upon which to postulate a factual finding that the plea was 'based' on the confession if the law affords no extraordinary encouragement to make the plea rather than to stand trial on the merits. But in capital cases in New Jersey there is an extraordinary encouragement to the accused to offer a plea of non vult if the court will accept it, and that encouragement is, of course, the death sentence that will result if on the trial the jury fails to recommend the lesser punishment of life imprisonment" (R. 15).

The fact that the instant matter involves a capital case renders inapplicable the case of *In re Domako*, 20 N.J. Super. 314, 90 A.2d 30 (App. Div. 1952), a non-capital case which suggests that by pleading guilty a defendant waives the right to attack a confession obtained by coercion. For the same reason *Trowbridge* v. *Pennsylvania*, 112 F.Supp. 356 (W.D. Penna. 1952), *affirmed*, 204 F.2d 689 (3d Cir. 1953), is inapplicable to the present case, as are the remarks of the Court in *Townsend* v. *Burke*, 334 U.S. 736, 92 L.Ed. 1690 (1948) insofar as they relate to the petitioner's claim of unlawful detention.

In any event, it has recently been held by the United States Supreme Court that a conviction following either a trial or a plea of guilty based upon a confession extorted by violence or by mental coercion is invalid under the Four-

teenth Amendment, *Pennsylvania* v. *Claudy*, 350 U.S. 116, 100 L.Ed. 126 (1956).

In that case the petition alleged that petitioner, who was 21 years old, was arrested and held incommunicado for three days. After 72 hours of intermittent questioning he confessed and was then taken before a justice of the peace. A month later he was taken before the Court of Common Pleas and charged with 30 offenses. He was not represented by counsel. The record of the proceedings showed that the petitioner told the judge that he was guilty and said "I throw myself at the mercy of the court, your honor." He pleaded guilty.

In spite of the guilty plea, the Supreme Court held that the charges in the petition as to the events which transpired, which included the obtaining of the confession, required a hearing as to their truth.

> "Our prior decisions have established that: (1) a conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause; . . . " U.S. at p. 118, L.Ed. at pp. 129, 130. (Italics supplied.)
>
> "It is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea." U.S. at p. 122, L.Ed. at p. 132.

The *Claudy* case involved proceedings tainted by a coerced confession. Its principles, however, are equally applicable to the present case wherein petitioner was deprived of a different constitutional right—i.e., effective assistance of counsel. Those principles support the proposition that petitioner's plea of *nolo contendere* under the circumstances of this case does not bar him from seeking relief, by way of his present action.

CONCLUSION

In view of all of the facts in this case (including petitioner's age and background; his confinement incommunicado for a long period without arraignment during which period law enforcement officers obtained his signature to a statement; the refusal to permit petitioner to consult with counsel during such period in spite of repeated requests for such consultation; the refusal to permit petitioner's counsel to inspect the statement so obtained; and the importance of the statement in relation to petitioner's plea of *non vult*, it is urged that the decision of the court below be reversed and that petitioner's application for a writ of habeas corpus be granted.

Respectfully submitted,

DICKINSON R. DEBEVOISE
Attorney for Petitioner